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SEX AND THE SINGLE MAN: DISCRIMINATION IN THE DEPENDENT CARE DEDUCTION

INTRODUCTION

Charles E. Moritz, a single never-married man, maintained a home for himself and his elderly mother who was unable to care for herself. In order to fulfill his employment responsibilities which involved travel, Moritz employed a woman to care for his mother and perform household duties. He paid the woman \$1250 in 1968 and deducted \$600 for "household help for invalid mother" on his individual income tax return for that year. This was the maximum deduction for dependent care expenses under section 214 of the Internal Revenue Code of 1954.¹ Section 214 provides:

(a) There shall be allowed as a deduction expenses paid during the taxable year by a taxpayer who is a woman or widower, or is a husband whose wife is incapacitated or is institutionalized, for the care of one or more dependents (as defined in subsection (d)(1)), but only if such care is for the purpose of enabling the taxpayer to be gainfully employed.

. . . .

(d)(1) . . . The term "dependent" means a person with respect to whom the taxpayer is entitled to an exemption under section 151(e)(1)—

(A) who has not attained the age of 13 years and who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the taxpayer; or

(B) who is physically or mentally incapable of caring for himself.

(2) . . . The term "widower" includes an unmarried individual who is legally separated from his spouse under a decree of divorce or of separate maintenance.²

The Internal Revenue Service disallowed the \$600 deduction and a deficiency notice against the taxpayer was asserted in the amount of \$328.80 for taxes due and owing in 1968. The taxpayer petitioned the Tax Court for a redetermination of this deficiency; however, the court ruled in favor of the Government.³

The Tax Court supported this decision with two arguments. The

1. All statutory references in the text are to the Internal Revenue Code of 1954.

2. INT. REV. CODE of 1954, § 214(a), (d).

3. Charles E. Moritz, 55 T.C. No. 14 (Oct. 22, 1970).

first was that Moritz, as a single never-married man, was not entitled to the deduction either by congressional intent or under the clearly written terms of the statute. The second argument was that exclusion of Moritz from the statute's provisions was not a denial of his right to due process under the fifth amendment. Despite these arguments, the court concluded that Moritz's "remedy lies with Congress, and not in this Court."⁴ This statement suggests that, although the court denied judicial relief to Moritz, his grievance was not without validity.

One legislative remedy which might be advanced is the enactment of a constitutional amendment forbidding the denial of equal rights on the basis of sex. The proponents of this measure would suggest that Moritz's grievance is the result of sexual discrimination.⁵ If an equal rights amendment were enacted, single male taxpayers necessarily would become entitled to the benefit of the section 214 deduction.⁶ It will be illustrated, however, that achieving an equitable solution to Moritz's problem cannot be accomplished simply in terms of an equal rights amendment.⁷ As Professor Paul Freund has pointed out, "[t]he basic fallacy of the proposed [equal rights] amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction."⁸ Analysis of Moritz's problem indicates that tax law may be an area in which Freund's criticism is especially relevant.

The problem posed by the court's arguments in *Moritz* concerns the equity of section 214. At the outset, it is submitted that section 214, as an isolated provision, is clearly discriminatory. This effect, however, neither was caused by nor results in discrimination purely on the basis of sex. One cannot readily conclude that a discriminatory provision such as section 214 necessarily violates constitutional due process. Furthermore, at the present time, judicial concern that tax legislation embody substantive due process is subordinate to the legislative concern that tax legislation be equitable. These legislative and judicial concerns are closely interrelated. Because of this interrelationship, achieving tax equity and insuring due process may come only from viewing an individual problem in the perspective of the tax system of which it is a part. While

4. *Id.*

5. Wallach, *Comparative Legal Status of American and Soviet Women*, 5 VAL. U.L. REV. 439 (1971).

6. Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281 (1971).

7. Cf. Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203 (1971).

8. 96 CONG. REC. 866 (1950). See also Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U.L. REV. 397 (1971).

the immediate problem must be recognized, a satisfactory solution can result only from dealing with the problem less in response to its specific identity and more in regard to the consequences of the proposed solution upon the system as a whole.

ACHIEVING TAX EQUITY: THE LEGISLATIVE CONCERN

The Tax Court's first argument supporting the decision to deny Charles E. Moritz a dependent care deduction was that the statute, while allowing a deduction to women and widowers, clearly excludes single never-married men. This statutory formulation, according to the court, is in direct accord with Congress' purpose for the provision. The court concluded that Moritz could "only avail himself of the deduction if he . . . [fit] within the terms of the statute, since deductions are solely matters of legislative grace."⁹

The statement that "deductions are solely matters of legislative grace" was a convenient justification of the court's interpretation of the statute. The merit of using this judicial rule to deny Moritz's claim, however, is questionable, especially in light of the congressional goals which are manifested in federal income tax legislation.¹⁰

Congressional Goals and Related Problems

Two basic principles of equity underlie individual income tax legislation. The first, which has given rise to the progressive features of our tax law, is that taxes should be levied in proportion to a taxpayer's ability to pay.¹¹ The second is that "equal amounts of income should bear equal tax liabilities."¹² The initial problem presented by the second principle, which bears more directly than the first upon provisions such as section 214, is to establish a statutory concept of taxable income.

It has been pointed out that

[c]onsistency of the legislatively defined tax base with a stated, measurable concept of income is the ultimately reliable test for adherence to the principle of equity in personal taxation. The "equal treatment of equals" means that individuals similarly

9. 55 T.C. No. 14 (Oct. 22, 1970).

10. The question of whether any federal legislation can be properly construed as a manifestation of "congressional goals" or "congressional intent" is not considered here.

11. STAFF OF CONGRESSIONAL JOINT COMM. ON THE ECONOMIC REPORT, 84TH CONG., 1ST SESS., FEDERAL TAX POLICY FOR ECONOMIC GROWTH AND STABILITY 84 (Joint Comm. Print 1955) [hereinafter cited as 1955 FED. TAX POLICY STUDY].

12. STAFF OF THE CONGRESSIONAL JOINT ECONOMIC COMM., 87TH CONG., 1ST SESS., THE FEDERAL REVENUE SYSTEM: FACTS AND PROBLEMS 1961, at 14 (Joint Comm. Print 1961) [hereinafter cited as 1961 FED. REVENUE STUDY].

circumstanced with respect to income pay the same tax bill. In a complex modern economy individuals differ in a multitude of ways, some relevant and some not. Whether or not two individuals should be considered similarly circumstanced can only be determined by defining an independent measure of income against which each separate circumstance can be tested.¹³

Congress has elected to define that independent measure of gross income indirectly.¹⁴ Under provisions of the Internal Revenue Code, certain kinds of receipts are specifically included in a taxpayer's gross income,¹⁵ but income is not limited only to the named receipts.¹⁶ Other provisions specifically exclude some types of receipts from gross income,¹⁷ yet "certain types of income, particularly certain types of income in kind, while not explicitly excluded from gross income, have never been construed in practice as included in this concept."¹⁸ Among the "income in kind" referred to is the economic benefit derived by a taxpaying unit from services both produced and consumed within the unit. For example, a taxpayer who washes and irons his own workshirts is gaining a personal benefit from his own productive labor. This benefit, called "imputed income," is not given a monetary value nor is it declared as income for tax purposes.¹⁹

After defining gross income, the Internal Revenue Code provides two major types of adjustments to determine a taxpayer's taxable income.²⁰ The first type of adjustment is based upon the recognition that some taxpayers must incur expense in order to produce income. For example, the corner grocer must purchase his stock at wholesale in order to sell it at retail. If his gross sales rather than his net profit were taxed, he would be discriminated against in favor of taxpayers who do not have such expenses. Trade and business expenses of this kind, therefore, are deducted from gross income before tax liability is computed. Secondly,

13. 1955 FED. TAX POLICY STUDY 354.

14. The term "indirectly" is used to describe the process because the Internal Revenue Code specifies that "income" is *not* certain things and *is* certain other things but is not limited to what has been so specified.

The discussion which follows is based generally on 1961 FED. REVENUE STUDY 1-5, 14-15.

15. See, e.g., INT. REV. CODE of 1954, §§ 71-81.

16. INT. REV. CODE of 1954, § 61(a).

17. See, e.g., INT. REV. CODE of 1954, §§ 101-23.

18. 1961 FED. REVENUE STUDY 3.

19. For a discussion of the imputed income problem in relation to proposed expansion of section 214 to include expenses incurred by a working wife for household help, see notes 133-38 *infra* and accompanying text.

20. 1961 FED. REVENUE STUDY 1.

Congress has chosen to provide special treatment for certain kinds of nontrade or nonbusiness expenses. "In some cases, the occasion for the special treatment has been the encouragement of certain types of socially desirable activity [for example, the deduction for charitable contributions²¹]; in others, the special treatment was intended to provide highly selective tax relief [for example, the dependent care deduction]."²² Many of the adjustments in this category are deductions for what are essentially personal expenditures.²³ Such provisions are exceptions to the rule of section 262 of the Internal Revenue Code which states that "[e]xcept as otherwise expressly provided . . . no deduction shall be allowed for personal, living or family expenses." This general policy is based upon recognition that the Government would receive little tax revenue if taxpayers were allowed to deduct their living expenses from income before computing tax liability.²⁴ Because of this policy, the wording of most provisions allowing deduction of personal expenses stands in marked contrast to the flexibility of section 162 which provides for deduction of "all . . . ordinary and necessary business expenses."²⁵ The latter provision allows wide latitude for administrative interpretation.²⁶ Deductions for personal expenses, on the other hand, are normally confined to the explicit terms of the statutory provision, just as the Tax Court ruled in the *Moritz* case.²⁷

Problems Arising from the Income Definition Process

The process by which taxable income is defined has been subject to severe criticism. One charge has been that the system, rather than producing equal treatment of equals, creates nonuniform tax burdens.

[I]t is contended that there has been a continuing loss of uniformity in the income tax base as differential provisions have been proliferated throughout the law, either by specific exclusions, deduction, or other qualification, or by failure to specify inclusion of various types of income.

. . . .

21. INT. REV. CODE OF 1954, § 170.

22. 1961 FED. REVENUE STUDY 1.

23. See, e.g., INT. REV. CODE OF 1954, § 165(d) (gambling losses), § 163 (interest on certain indebtedness), § 213 (certain medical expenses).

24. STAFF OF THE HOUSE COMM. ON WAYS & MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM 376 (Comm. Print 1959) [hereinafter cited as COMPENDIUM].

25. INT. REV. CODE OF 1954, § 162.

26. "Probably no other statutory allowance has been such a fertile source of litigation as the business expense allowance has been and still continues to be." 4A J. MERTENS. THE LAW OF FEDERAL INCOME TAXATION § 25.01 (1966).

27. 55 T.C. No. 14 (Oct. 22, 1970).

This multiplicity of differential tax provisions, it is argued, is the result of a continuing process of attempting to provide tax adjustments for special types of situations. The basic difficulty, it is pointed out, is in the fact that forsaking uniformity in any one case gives rise to demands for similar concessions in others The result is a highly nonuniform income-tax system which places a premium upon tax-avoidance devices and increases the relative tax burden on those taxpayers who are unable to take advantage of the special provisions.²⁸

Tax critics not only fault the income definition process for its nonuniformity but also claim that the process results in high effective rates of tax.²⁹ High overall rates, in turn, add to the cycle.

The history of our income tax statute shows a tendency to enact new personal deductions to alleviate the effect of high rates on selected taxpayers. Such enactments erode the tax base and cause the rates on the remaining taxable income to rise even higher. Each increase in rates brings new demands for added deductions.³⁰

The legislative response to charges of inequity and discrimination in tax law has been to attempt to remedy the problem with special tax relief.³¹

Many of the special provisions owe their existence to the discrimination argument. Perhaps the principal point made before Congress is that, since one group in our society has received a benefit, the complainant deserves like treatment. The more preferential the legislation written into the code, the greater the opportunity for others to claim they are being discriminated against. The difficulty lies in finding, first, some logical basis for drawing a line, and second, some political groups supporting the policy of drawing it.³²

These criticisms are all founded in the view that the multiplicity of special provisions allows the taxpaying public to believe that the system provides preferred treatment to special classes at the expense

28. 1961 FED. REVENUE STUDY 14-15. See generally COMPENDIUM 251-75, 297-311.

29. COMPENDIUM 440.

30. *Id.*

31. 1955 FED. TAX POLICY STUDY, *supra* note 11, at 273.

32. *Id.*

of achieving tax equity for all taxpayers.³³ The special provisions like section 214 which comprise the income definition process are subject to this general criticism. It has been suggested that if many provisions allowing deductions to special classes were eliminated, a general rate reduction could be accomplished with no revenue loss.³⁴ Others suggest that the personal exemption allowances be increased and special deductions be limited.³⁵ A more extreme suggestion is that the concept of the taxpaying unit be revised in order to promote tax equity.³⁶

Whether any tax reform measure could operate as a panacea to eliminate most taxpayer dissatisfaction cannot be determined here. Mentioning these criticisms and alternative approaches, however, is relevant to the immediate question because it should be kept in mind that section 214 is part of only one of many possible approaches to achieving tax equity. If it became clear beyond theoretical debate that the existing tax system was inequitable, there would be alternative solutions available for legislative consideration. The continued existence of these viable alternatives should be encouraged.³⁷

A Legislative Analysis of Section 214

Section 214, the dependent care deduction, is an example of one of the special provisions which comprise the income definition process. The Tax Court stated in *Moritz* that "[t]he legislative history [of section 214] shows that Congress gave serious consideration before . . . [its] enactment . . . to various points of view. Its action cannot be said to be arbitrary, capricious or unreasonable."³⁸ It is submitted, however, that thorough examination of that legislative history unearths no reasonable justification for exclusion of single never-married men from the benefit of section 214.

A deduction for dependent care expenditures was enacted into law for the first time in 1954 as part of the massive revision of tax law codified as the Internal Revenue Code of 1954. The process by which this deduction became part of the law followed the general pattern of development of special provisions discussed previously.³⁹

33. See generally 1955 FED. TAX POLICY STUDY 251-311; Surrey, *The Congress and the Tax Lobbyist*, 70 HARV. L. REV. 1145 (1957).

34. See generally COMPENDIUM 317-472.

35. *Id.* at 493-538.

36. See generally *id.* at 531-38; Note, *Tax Treatment of the Family: The Canadian Royal Commission on Taxation and the Internal Revenue Code*, 117 U. PA. L. REV. 98 (1968), in READINGS IN FEDERAL TAXATION 396 (F. Sander & D. Westfall ed. 1970).

37. See note 126 *infra* and accompanying text.

38. 55 T.C. No. 14 (Oct. 22, 1970).

39. See p. 419 *supra*.

Prior to 1954, expenditures for dependent care were classified as personal expenses and were not deductible.⁴⁰ Congress recognized, however, that expenses incurred to provide care for dependents in order that the taxpayer could work in some cases were very similar to business expenses.⁴¹ It was argued that these taxpayers were discriminated against in relation to taxpayers who could take deductions for such things as expenses incurred to entertain business clients under the umbrella of the "ordinary and necessary business expense."⁴² In response to this charge, the House Ways and Means Committee recommended a limited deduction for child care expenses.⁴³ This provision, approved by the full House, was substantially liberalized when the House bill reached the Senate Finance Committee.⁴⁴ The full Senate approved the amended version of the deduction which not only allowed more taxpayers to take advantage of the measure but also expanded the scope of the deduction to include expenses incurred for the care of *any* dependent unable to care for himself as well as for expenses for the care of young children.⁴⁵ The expanded Senate version was retained in the joint committee compromise on the measure⁴⁶ and became enacted into law as section 214.

With agreement that equity demanded that a deduction be allowed for certain dependent care expenses, Congress' major goal was to design a provision which would confine the deduction to the dependent care

40. 100 CONG. REC. 3441 (1954) (extension of remarks of Congressman Jenkins); see note 111 *infra* and accompanying text.

41. H.R. REP. NO. 1337, 83d Cong., 2d Sess. (1954), reported in U.S. CODE CONG. & AD. NEWS 4017, 4055 (1954) [hereinafter cited as H.R. REP. NO. 1337].

42. 100 CONG. REC. 3451 (1954) (remarks of Congressman Forand); *Hearings on H.R. 8300 Before the Senate Comm. on Finance*, 83d Cong., 2d Sess. 1059, 1062 (1954) [hereinafter cited as 1954 *Hearings*]; cf. 1955 FED. TAX POLICY STUDY, *supra* note 11, at 87.

43. H.R. REP. NO. 1337, at 4055. In order to provide clarification for the action taken by the House and Senate on the dependent care deduction, a brief summary follows of the route taken by the entire tax revision measure as it passed through Congress. The Constitution requires that revenue bills be initiated by the House of Representatives. U.S. CONST. art. I, § 7. Since bills are discussed in the appropriate congressional committee before being reported for floor debate, the tax measure was initiated by the House Ways and Means Committee. H.R. REP. NO. 1337, at 4055. The tax bill produced by that Committee was passed by the House. 100 CONG. REC. 3564 (1954). The House bill then went to the Senate Finance Committee, which held its own public hearings on the measure. 1954 *Hearings*, *supra* note 42. The Senate Committee recommended an amended version of the House bill, which was passed by the full Senate after some minor changes. 100 CONG. REC. 9619 (1954). For full text of Senate amendments see S. REP. NO. 1622, 83d Cong., 2d Sess. (1954). Both House and Senate versions of the bill were then forwarded to a joint committee. 100 CONG. REC. D630-31 (Daily Digest 1954). The compromise version of the bill which emerged was passed subsequently by both House and Senate and was enacted into law. *Id.* at D653, D655.

44. S. REP. NO. 1622, 83d Cong., 2d Sess. 36 (1954).

45. *Id.*

46. 100 CONG. REC. D630 (Daily Digest 1954).

expenditures most like "business" expenses.⁴⁷ Distinguishing in the technical sense required by tax law between dependent care expenditures made for "personal" reasons and those which were more "business-like" might be done on the following basis.⁴⁸ Providing care for another person is a productive activity requiring the expenditure of time and energy. If an individual has a responsibility to provide such care, hiring a substitute to provide that care in one's stead could be motivated by two kinds of reasons. The first is to obtain time and energy to expend on another kind of productive activity; the second is to obtain leisure time. The expense of hiring a substitute is most like a business expense only when that expense is incurred to obtain time and energy to direct towards earning a livelihood. If one enters a productive activity for non-economic reasons or opts for expanded leisure time, then expenditures for substitute care are more like a freely chosen personal expense than a necessary business expense. A similar analysis will be used to explain the limitations which Congress incorporated in section 214 to confine the deduction to "business-type" expenditures.

A few other goals for the provision have been mentioned either during the original congressional consideration of the measure or in later analysis of the provision.⁴⁹ The first of these subsidiary goals was administrative: to limit the measure to prevent excessive loss of revenue.⁵⁰ The remaining goals relate to social policy: to provide a hardship subsidy to certain taxpayers⁵¹ and to encourage citizens to care for their children properly.⁵²

47. In the 83d Congress the Republicans were the majority party for the first time since the early 1930's (with the exception of a two-year interlude in 1947-49 with the 80th Congress). Perhaps the most frequent type of criticism of the tax revision proposal made by the Democratic minority was a variation on the traditional party slogan that the Republicans were giving preferred treatment to higher income groups at the expense of the working man. See, e.g., 100 CONG. REC. 9154 (1954) (remarks of Senator Douglas). Floor debate on the proposal indicates that the Republican members were particularly concerned with trying to allay that charge. The limitations placed on section 214 could be considered as an effort to exhibit the desire of the Republican majority to benefit needy taxpayers who had been ignored during twenty years of Democratic power. See, e.g., 100 CONG. REC. 3452 (1954) (remarks of Congressman Curtis).

48. See note 110 *infra* and accompanying text.

49. The goal of achieving tax equity to solve an imputed income problem, suggested by some analysts, will not be discussed at this point. See notes 133-38 *infra* and accompanying text.

50. 1954 *Hearings* 117; COMPENDIUM 10. The original House measure would have reduced revenues by \$40 million. H.R. REP. NO. 1337, at 4055. The expansion of the proposal by the Senate more than tripled the estimated cost to \$130 million. S. REP. NO. 1622, *supra* note 44, at 36.

51. COMPENDIUM 372.

52. 100 CONG. REC. 3422 (1954) (remarks of Congressman Reed, Chairman of House Ways & Means Comm., introducing the tax measure on House floor).

LIMITING THE DEPENDENT CARE DEDUCTION

Congress enacted five fundamental limitations⁵³ in the original 1954 version of section 214 to confine the deduction in order that the major goals mentioned above could be achieved and congressional opposition be minimized. These limitations are in the following terms: 1) the purpose for which the expenditures are made; 2) characteristics of the persons for whose care expenditures are made; 3) the total amount which can be deducted; 4) the income of the family in the case of married couples; and 5) characteristics of taxpayers entitled to claim the deduction.⁵⁴

The First Limitation: The Taxpayer's Motive

Congress limited the deduction in terms of the purpose for which deductible expenditures are made by providing that "[t]here shall be allowed as a deduction expenses paid . . . for the care of one or more dependents . . . but only if such care is for the purpose of enabling the taxpayer to be gainfully employed."⁵⁵ This limitation clearly eliminated the chance that the deduction would be used by taxpayers who employed substitute care in order to gain leisure time or to participate in an activity which is not income-producing. It has been pointed out, however, that "[n]either the Code nor the [Treasury Department] Regulations [enacted in furtherance of the statute] say or even suggest that economic necessity must force the taxpayer to work."⁵⁶ Consequently, although the provision does guarantee that expenses deducted are incurred for the production of income, like "business" expenses, the terms of the limitation do not confine the deduction successfully to purely a hardship subsidy for needy taxpayers.

The Second Limitation: For Whom is Care Provided?

The section 214 deduction frequently has been called the "child-care provision,"⁵⁷ but the scope of the deduction is not limited only to children. The original House proposal would have provided a deduction for expenses incurred for the care of a child under the age of ten, or

53. The provision contains other limitations which are not discussed here, e.g., expenses must have been incurred during the taxable year and paid to someone not a dependent of the taxpayer.

54. It was the terms of this fifth limitation which Moritz contended were arbitrary, capricious and unreasonable.

55. INT. REV. CODE OF 1954, § 214.

56. *How to Get the Maximum Deduction for the Care of Children and Other Dependents*, ¶ 11,010 P-H TAX IDEAS 11,231; 11,235-36 (1969).

57. See, e.g., COMPENDIUM 404; Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114 (1955).

sixteen if the child was physically or mentally unable to attend a regular school.⁵⁸ The version of the bill which became law, however, allowed a deduction both for care of a child under twelve⁵⁹ and also for care of any other person for whom the taxpayer could claim a dependency exemption under sections 151(e)(1) and 152 of the Code, as long as that person was unable to care for himself.⁶⁰

Changing the age below which expenses could be claimed from ten to twelve resulted from recognition by the Senate Finance Committee that "the problems of providing adequate supervision for children while the parent is employed include those for children up to 12 years of age"⁶¹ An age limit was still retained, however, to limit the deduction to "business-type" expenses. "Denial of the deduction to parents with children who have gone beyond the sixth grade helps to avoid granting allowances to working parents who hire maids or other servants primarily to perform services other than to take care of the children."⁶² In addition, the Senate committee recognized that "financial problems [similar to those of working parents eligible for the deduction] may be incurred by taxpayers who, if they are to be gainfully employed, must provide care for physically or mentally incapacitated dependents other than their children."⁶³ The deduction was expanded to include expenditures for care of such dependents.

The terms of this limitation are reasonably successful when considered as an attempt to confine the deduction to "business-type" expenditures. If the expenditure is for the care of a young child, the taxpayer has a legal obligation to support and care for the child. If the expenditure is for care of another dependent, the expense is deductible only if that person is unable to care for himself and if the taxpayer provides over half of that person's support.⁶⁴ In either case, therefore, the taxpayer is responsible for providing care and must find a substitute to provide that

58. H.R. REP. NO. 1337, *supra* note 41, at 4055.

59. The age limit was raised to 13 by Revenue Act of 1964, Pub. L. No. 88-272, § 212, 78 Stat. 19, amending INT. REV. CODE of 1954, § 214 (codified at INT. REV. CODE of 1954, § 214(d)(1)(A)).

60. INT. REV. CODE of 1954, § 214(d).

61. 100 CONG. REC. 8995 (1954) (remarks of Senator Millikin, Chairman of Senate Finance Comm., introducing the tax measure on Senate floor). For testimony supporting the change see 1954 *Hearings* 807, 1798-99, 1993.

62. Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114, 121 (1955).

63. S. REP. NO. 1622, *supra* note 44, at 36. For testimony supporting the change see 1954 *Hearings* 276-77, 691, 1358, 1698-1700, 1798-99, 1913 (repeated at 2202-03), 2232-33.

64. Apparently these requirements also apply to a child of the taxpayer over 19 years of age under sections 151(e) and 152.

care in his stead if he is to be gainfully employed.

This limitation is probably not as successful in achieving its social policy goals. The provision may have been intended to encourage employed low income parents to provide substitute care for their children.⁶⁵ If this is the case, the result is more form than substance because a taxpayer must itemize his deductions before he can benefit from the provision. It has been pointed out that many low income parents with dependent care expenses must use the standard deduction either because of the difficulty of itemizing expenses or because with little disposable income these taxpayers make few expenditures which qualify for deductibility.⁶⁶

The Third Limitation: The Amount of the Deduction

The maximum amount deductible under the 1954 provision was \$600.⁶⁷ This dollar limitation has been justified in "business expense" terms:

The maximum limit of \$600 is a rough method of differentiating between the business-expense element of child-care expense and the personal-expense element. Of necessity, such a limit must be arbitrary, and it is better to set it at a relatively low level to avoid the criticism that the deduction subsidizes luxury-type personal expenditures.⁶⁸

The \$600 limitation has been criticized for not promoting the social policy goals of the deduction. As mentioned previously,⁶⁹ possible benefits under the provision may be unattainable by a taxpayer because of the itemizing requirement. In addition, the limitation has been considered too small to have any real incentive effect or to serve as a hardship subsidy for low income taxpayers.⁷⁰ It was pointed out during congressional debate on the measure that the amount deductible is only an average of \$11.54 a week. Even in 1954, Congressmen wondered who could find adequate child care for that amount.⁷¹ Furthermore, because the provision operates to determine taxable income rather than

65. See note 52 *supra* and accompanying text.

66. 100 CONG. REC. 9605 (1954); 1954 *Hearings* 807, 881, 1993. See also COMPENDIUM 435-36, 439.

67. This limitation was increased to \$900 if there are two or more dependents by the Revenue Act of 1964, Pub. L. No. 88-272, § 212, 78 Stat. 19, amending INT. REV. CODE of 1954, § 214 (codified at INT. REV. CODE of 1954, § 214(b)(1)(B)).

68. Pechman, *supra* note 62.

69. See note 66 *supra* and accompanying text.

70. H.R. REP. NO. 1337 (Minority Views), *supra* note 41, at 4603; 100 CONG. REC. 3451, 3456 (1954); 1954 *Hearings*, *supra* note 42, at 807, 1059-60, 1062, 1993.

71. 100 CONG. REC. 3451 (1954); 1954 *Hearings* 807.

actual tax liability, the maximum amount of monetary benefit a taxpayer could receive through the deduction is never as much as \$600. For a single head of household with total taxable income between \$4000 and \$6000, the maximum reduction in actual tax liability under the provision is only \$120.⁷² The taxpayer must have spent at least \$600 for dependent care in order to receive this maximum reduction. The terms of this limitation also tend to provide a greater potential benefit to higher income taxpayers than to very low income taxpayers. These individuals must search for the least expensive care available, despite the token offset against their expenses. If a low income taxpayer is fortunate, an older child, a relative or a neighbor may be able to look after the children without charge; in such a case, the taxpayer would receive no benefit under section 214.⁷³ Finally, it should be pointed out that a working parent's decision to obtain substitute care is probably dependent upon the parent's recognition that good care is needed, the kinds of care facilities available and the parent's ability to pay for the substitute care he selects. It is doubtful that the existence of section 214 is a determinative factor at all.

The Fourth Limitation: The Income Ceiling on Married Taxpayers

The original House proposal did not include a child care deduction for wives with working husbands.⁷⁴ The scope of the provision was expanded during Senate consideration of the measure to allow a dependent care deduction to a working married woman but only if the woman filed a joint return with her husband. The amount of the deduction would be reduced dollar for dollar by the amount by which the couple's adjusted gross income exceeded \$4500. After their combined income reached \$5100, therefore, no dependent care expenses could be deducted.⁷⁵

It has been suggested that placing an income ceiling on married taxpayers but not on widows, divorced persons or other single persons

72. Computed from INT. REV. CODE of 1954, § 1(b)(1)(B), rates of tax on heads of households for taxable years beginning after December 31, 1964.

73. The counterargument has been made that tax provisions are not *intended* to benefit those who cannot qualify for them and that it is absurd to criticize a tax provision for failing to benefit all needy citizens on the ground that needy citizens who don't pay taxes don't receive benefits under tax provisions.

74. H.R. REP. No. 1337, *supra* note 41, at 4055.

75. S. REP. No. 1622, *supra* note 44, at 36. The income ceiling was raised to \$6000 and husbands with incapacitated wives were included, with the income ceiling and joint return requirements, by Revenue Act of 1964, Pub. L. No. 88-272, § 212, 78 Stat. 19, *amending* INT. REV. CODE of 1954, § 214 (codified at INT. REV. CODE of 1954, § 214(a), (b), (c), (d)(4)).

entitled to the deduction is relatively indefensible.⁷⁶ The income ceiling for married taxpayers can be defended, however, if considered as part of the goal of confining the deduction to "business-type" expenditures. A single person with dependents requiring both care and support is faced with two mutually exclusive demands on his time and energy. He *cannot* choose between spending his time providing support and spending his time providing care; both must be done, and the nature of the responsibilities requires that both must be done *at the same time*. Therefore, for a single taxpayer, hiring a substitute to provide care is always like a "business" expense incurred in order to obtain time and energy to be gainfully employed.⁷⁷ The particular level of income derived from the employment is irrelevant to the question of his motivation for hiring a substitute. For the employed couple with dependents, however, the situation is different. Maintaining a certain income level is essential to provide adequate support for a family. That income level was estimated at \$4500 in 1954, a figure which is necessarily arbitrary but arguably reasonable.⁷⁸ If one spouse alone can earn this amount, the decision of the other spouse to be gainfully employed is a decision based much more upon personal rather than economic factors. Therefore, according to this analysis, dependent care expenses incurred to permit the second spouse to be gainfully employed when the family income is above the income ceiling level are much more like "personal" expenses than like "business" expenses.⁷⁹

Though the terms of the provision permit this "business expense" analysis to account for the income ceiling, the arguments given in support of the limitation when the measure was under consideration were based on administrative factors and social policy. According to Undersecretary of the Treasury Marion B. Folsom, the administrative reason for the limitation was that allowing working wives whose husbands were also working to deduct dependent care expenses regardless

76. Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114, 121 (1955).

77. See p. 423 *supra*.

78. "In 1961, according to the Department of Labor Statistics, the median income of husband-wife families in which the wife worked at any time during the year was \$7,050." S. REP. No. 830, 88th Cong., 2d Sess. (1964) in U.S. CODE CONG. & AD. NEWS 1673, 1741 (1964). The Senate proposed increasing the income ceiling to \$7000 in 1964; the compromise version of the bill which was enacted into law provided for a \$6000 income ceiling. See note 75 *supra* and accompanying text.

79. The "business-type" expense analysis breaks down when applied to the husband with an incapacitated or institutionalized wife. See note 75 *supra*. Since his wife is unable to provide child care, there seems to be no material difference between his situation and that of a widower or divorced man who is not restricted by the income ceiling.

of family income would be too costly in terms of tax revenue loss.⁸⁰ The social policy argument was presented by Treasury Secretary George Humphrey who testified that because of concern about rising juvenile delinquency,⁸¹ allowing working wives to deduct child care expenses had been opposed in the House Ways and Means Committee because of "great arguments that the mother ought to be at home looking after her children where there is a wage earner in the family."⁸² The Senate Finance Committee, however, recognized that "in a large number of families, both the husband and wife must be gainfully employed in order to maintain an adequate living standard for their families"⁸³ and therefore provided a deduction when both spouses work because of economic necessity.⁸⁴

It should be emphasized that although the provision arose from traditional concepts of sex roles—that men are breadwinners and women's place is in the home—the provision *in practice* does not discriminate against couples who do not choose a traditional arrangement of family responsibilities. This is a result of the requirement that a working married woman claiming the deduction file a joint return with her husband if he is not disabled. The joint return was a necessary requirement to administer the income ceiling qualification. Because of the joint return, the deduction, although strictly speaking available only to the wife, is actually available to both husband and wife. The deduction therefore could be claimed not only by the "traditional" family when the wife becomes gainfully employed but also if the wife has been supporting the family and then the husband, who had been caring for the children, obtained employment. Therefore, *regardless of family arrangements*, the deduction can be used by married couples subject only to the income ceiling.

The Fifth Limitation: The Characteristics of Eligible Taxpayers

The original House proposal would have restricted use of the deduction to widows, widowers, divorced persons and wives whose husbands were incapacitated or institutionalized.⁸⁵ This original proposal set the pattern for the final version; rather than describing those tax-

80. 1954 Hearings, *supra* note 42, at 117.

81. See, e.g., Hearings Pursuant to S. Res. 89, *Investigation of Juvenile Delinquency in the United States, Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 1st & 2d Sess. (1954).

82. 1954 Hearings, *supra* note 42, at 117.

83. 100 CONG. REC. 8995 (1954) (remarks of Senator Millikin).

84. S. REP. NO. 1622, *supra* note 44, at 36. For testimony in support of this change see 1954 Hearings 807, 1057-63, 1798-99, 1993, 2365-66.

85. H.R. REP. NO. 1337, *supra* note 41, at 4055.

payers who were excluded from the terms of the provision, the proposal described the taxpayers who could use the deduction. The final version of the limitation, however, had been expanded so much from the original terms that only men who were neither widowed, divorced nor legally separated were excluded. This expansion reflected arguments both of minority members of the House Ways and Means Committee⁸⁶ and of many individuals whose testimony was considered during the Senate Finance Committee hearings.⁸⁷

Charles E. Moritz, a single never-married man, was one of the individuals excluded by this limitation. Moritz claimed that he was similarly situated to single women and widowers who could claim the deduction. Because of this similarity, Moritz contended that the provision is arbitrary, capricious and unreasonable in excluding him.⁸⁸

If there is a reasonable basis for creating a distinction between single never-married men and the taxpayers entitled to the deduction, then Moritz's contention is invalid. Whether a reasonable basis exists, however, will be determined by considering the relationship between a taxpayer and a dependent for whom the taxpayer must provide care. There are two categories of dependents for whose care expenditures are deductible: young children and other individuals unable to care for themselves.

A single never-married man acquires a child care responsibility if he becomes an adoptive parent or if he assumes custody of his illegitimate child.⁸⁹ There is no difference between the relationship of the taxpayer and child in these situations and that relationship when the taxpayer is a single never-married woman or a widowed or divorced man. In any case the taxpayer has a legal responsibility to provide both support and care for the child; his expenditures for substitute care to allow him to be employed are no less a "business-type" expense when he is a single never-married man than in any other situation. Considering social policy consequences, it seems absurd to reward a single woman who supports and provides care for an adopted or natural child but not to encourage single never-married men to provide a home for a needy child.⁹⁰

86. *Id.* at 4603.

87. 1954 *Hearings* 117, 276-77, 691, 807, 1057-63, 1238, 1358, 1698-1700, 1798-99, 1993, 2365-66.

88. 55 T.C. No. 14 (Oct. 22, 1970).

89. It should be noted that many states have laws requiring a man to provide financial support for his illegitimate child, but this discussion concerns acquiring a personal responsibility to provide *care* for a child in addition to support.

90. See COMPENDIUM 461.

Charles E. Moritz's situation provides the most obvious example of how a single never-married man might acquire a responsibility to support and care for a dependent other than a child—the situation of the aged parent who can no longer care for himself. The relationship between an adult taxpayer and his parent, when the taxpayer is a single never-married man, differs little from any other case. An adult child has no common law duty to support or care for a parent. Any legal duty adhering to the relationship between parent and child would arise from a contract between them or from a state law such as those relating to support of the indigent.⁹¹ In the absence of a legal duty, the responsibility of providing care and support is assumed through affection or a sense of moral duty. Whether based upon law, morality or affection, however, the responsibility is no different when the taxpayer is a single never-married man from any other case. Again, as with children, there is no basis for the distinction by means of a "business expense" argument. Similarly, explanations in terms of social policy produce absurd results. Encouraging single women and widowers to provide care for their disabled parents but not encouraging single never-married men to do the same is without justification.

It is submitted, therefore, that there is no justification in terms of "business expense" or social policy for the provisions of the limitation by which Moritz was excluded from the benefit of section 214. The Tax Court stated in support of the terms of the limitation that "during the Senate hearings on the 1954 Code, there was testimony on the issue of allowing the deduction to all single individuals, but this was rejected as is evident from the final form of the provision."⁹² Looking at the results of the limitation and the manner in which the provision changed as the tax bill wound its way through Congress, it is much more reasonable to suggest that a deduction for single never-married men was not specifically rejected, as the Tax Court claimed, but simply omitted by oversight.⁹³ It is true that suggestions were made during the Senate hearings to extend the deduction to "all taxpayers"⁹⁴ and single taxpayers⁹⁵ who otherwise qualified. The Senate committee was concerned, however, that its benevolence in extending the provision not be too costly in terms of lost tax revenue,⁹⁶ and the term "all taxpayers" may

91. For an example of state law see COLO. REV. STAT. ANN. § 40-12-18 (1963). Colorado was Moritz's state of residence.

92. 55 T.C. No. 14 (Oct. 22, 1970).

93. COMPENDIUM 461.

94. 1954 Hearings 1798-99.

95. Cf. 1954 Hearings 277.

96. See note 80 *supra* and accompanying text.

have seemed unnecessarily broad. The plight of the working unwed mother⁹⁷ and that of the single woman supporting an aged parent⁹⁸ were specifically brought to the attention of the Senate committee, and (in a way that has been called "the incorporation of a private bill in public law"⁹⁹) these particular hardship cases were given relief under the provision.¹⁰⁰ The fact that there were many similarly situated taxpayers excluded from relief by the terms of the provision might not have been apparent in the short time Congress had to analyze the bill.¹⁰¹ The words of the chairman of the Senate Finance Committee, Senator Millikin, as he introduced the tax bill on the floor of the Senate, afford basis for the additional conjecture that he, at least, actually had been left with the impression that *any* taxpayer supporting and caring for a dependent other than a child was included in the provision. Senator Millikin stated that "[r]elief is extended to *a single taxpayer*, who in order to be employed, may have to provide care for a dependent, other than a child, who is physically unable to care for himself."¹⁰² The conjecture regarding this comment seems just as valid as the Tax Court's statement in *Moritz* that "the final form of the provision" indicated a specific intent to reject the proposal to allow all single taxpayers to claim the deduction. That conclusion of the court, in view of the legislative history of the provision, is less reasonable than the suggestion made previously—that similarly situated taxpayers excluded from the provision were omitted by oversight, the result of a desire to maintain tax revenues coupled with the fact that no one noticed the potential discrimination at the time. This discussion, though suggesting how Congress even with the best of intentions might have enacted an unreasonably discriminatory law, does not offer justification for retaining the existing terms of the provision.¹⁰³

97. 1954 *Hearings* 1062.

98. *Id.* at 276-77, 691, 1798-99.

99. 1955 FED. TAX POLICY STUDY, *supra* note 11, at 259.

100. 100 CONG. REC. D440 (Daily Digest 1954).

101. *Cf.* 100 CONG. REC. 9606 (1954) (motion of Senator Douglas to recommit the tax bill for additional study and debate on motion). *See also* 100 CONG. REC. 8993 (1954) (remarks of Senator Millikin):

There are some who urge that action on this bill should be delayed to permit further study and analysis of its provisions as a safeguard against possible errors. But . . . if any errors should develop, they can be corrected by subsequent legislation.

Postponing action now . . . [would mean that] the widow and working wife seeking relief this year for child-care expenses will not . . . [receive it].

Id.

102. 100 CONG. REC. 8995 (1954) (emphasis added). *Cf.* 100 CONG. REC. D440 (Daily Digest 1954) noting especially the wording of modification (2).

103. "Laws enacted with good intention, when put to the test, frequently, and to the

ASSURING DUE PROCESS: THE JUDICIAL CONCERN

Though it can be concluded that the terms of the fifth limitation are indeed unreasonable, the question raised before the Tax Court by Charles E. Moritz cannot yet be answered. One must consider whether the unreasonableness of the provision necessarily results in an unconstitutional violation of Charles E. Moritz's right to due process under the fifth amendment.

The Tax Court stated in *Moritz*:

We glean from petitioner's argument a constitutional objection based, it seems, on the due process clause of the fifth amendment. Petitioner claims discrimination in that he, a single male, is not entitled to the same tax treatment under Section 214 as other single persons, widowers and single women, are entitled.

The objection is not well taken. As stated previously, deductions are within the grace of Congress. If Congress sees fit to establish classes of persons who shall or shall not benefit from a deduction, there is no offense to the Constitution, if all members of one class are treated alike. Such classifications have traditionally been held to be constitutional.¹⁰⁴

Mertens points out that "[w]hat constitutes 'due process' [in the context of federal income tax legislation] defies description."¹⁰⁵ To this can be added the statement of the Supreme Court that "[e]xcept in special and rare instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution."¹⁰⁶

The power of Congress to tax individual income under the sixteenth amendment has been upheld since the Supreme Court's 1915 decision of *Brushaber v. Union Pacific Railroad*.¹⁰⁷ Some courts have suggested, however, that certain kinds of deductions for business expenses may be a matter of "fundamental right" because of a distinction between gross receipts and the "income" which can be taxed.¹⁰⁸ Because the power to

surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

104. 55 T.C. No. 14 (Oct. 22, 1970).

105. 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 4.09 (1969).

106. *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1933).

107. 240 U.S. 1 (1915).

108. *Davis v. United States*, 87 F.2d 323 (2d Cir.), cert. denied, 301 U.S. 704 (1937).

tax "income" is indisputable, any deductions for personal expenses have been provided as a matter of legislative grace.¹⁰⁹ Mertens points out that even if such a distinction is valid

[i]t is not always easy to determine whether the particular item of expense is personal to the taxpayer or incurred in connection with his business. . . .

Expenses incurred in order to permit a taxpayer to carry on a business are not deductible unless the expense may be said to have been incurred in the carrying on of the business itself.¹¹⁰

Moritz might have attempted to argue that his dependent care expenses were like business expenses and should have been deductible as a matter of "fundamental right." It is unlikely, however, that a court would accept this argument. In *Mildred A. O'Connor*,¹¹¹ a 1946 decision rendered before the enactment of a dependent care deduction, the Tax Court ruled that for a married couple, the cost of hiring a nursemaid to care for their children while both parents were employed was not deductible either as an ordinary and necessary business expense or as a nonbusiness expense incurred in the production of income. When Congress responded to the equity argument posed by *O'Connor* and similar cases,¹¹² instead of declaring that expenses for the care of children and other dependents *were* "ordinary and necessary business expenses," dependent care expenses were made the subject of a *special* deduction under section 214. Therefore, a court might argue that Congress did not actually classify such expenses as the kind which might be deductible as a matter of "fundamental right" and did not choose to include Moritz within the scope of its "grace."

The *Brushaber* decision¹¹³ not only declared a federal income tax to be a constitutional exercise of Congress' power but also established the right of Congress to create classifications for the purpose of taxing income and to treat those classifications differently. The Supreme Court said that such classifications would violate due process only if they were "so wanting in basis for classification as to produce such a gross and patent inequality"¹¹⁴ that the statute resulted in confiscation rather than taxation. The distinction between married and single taxpayers is one

109. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934).

110. 4A J. MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 25.02 (1966).

111. 6 T.C. 323 (1946).

112. *See, e.g.*, Edward Hauser, 49 P-H Tax Ct. Mem. 331 (1949).

113. 240 U.S. 1.

114. *Id.* at 25.

classification which has withstood this test.¹¹⁵ Moritz's claim of unconstitutional discrimination was based as much upon the fact that he was single as upon the fact that he was a man. Whether discrimination on the basis of sex in a federal income tax statute violates fifth amendment due process has never been determined by the Supreme Court.¹¹⁶ The "strong tendency on the part of the courts to sustain the constitutionality of a tax"¹¹⁷ would have to be overcome, however, before Moritz's claim would be considered on its merits. As Mr. Justice Douglas wrote in the Supreme Court's opinion in *Helvering v. Lerner Stores Corp.*,¹¹⁸ "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause."¹¹⁹

If a court were to consider Charles E. Moritz's claim on its merits, it would have to determine whether section 214 violates due process by not allowing Moritz to deduct \$600 from his total taxable income but allowing the deduction to a woman or widower in Moritz's position. As noted previously,¹²⁰ because Moritz was denied the deduction he owed an additional \$328.80 in federal income taxes for 1968.¹²¹ Despite the fact that this result is clearly discriminatory, it is not intuitively clear that the "gross and patent inequality" test¹²² is satisfied, particularly

115. For a discussion of tax equity problems created by distinction between married and single taxpayers see COMPENDIUM 473-86.

116. In *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900), the Court stated that

if . . . discrimination [in a state tax statute] were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes.

But see note 119 *infra* and accompanying text.

117. 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 4.01 (1969).

118. 314 U.S. 463 (1941).

119. *Id.* at 468; cf. *C.J. Tower & Sons v. United States*, 135 F. Supp. 874, 879-80 (Cust. Ct. 1955):

Considering plaintiff's claim that the fifth amendment, forbidding the taking of property without due process of law, is broad enough to cover all or nearly all cases of unequal protection of the laws . . . [the tax at hand] applies equally to all in each specified class. Therefore, it meets the test of constitutional equal protection and is valid.

120. See note 3 *supra* and accompanying text.

121. The amount of Moritz's tax deficiency because of denial of the deduction represents 54.8% of the added \$600 increment to his taxable income. Using the rate table cited at note 72, *supra*, Moritz's total taxable income must have been around \$44,000 and his total tax liability slightly more than \$16,520. As a result of the discrimination, therefore, Moritz is paying about 2% more in total taxes than he would if he were a woman or a widowed or divorced man.

122. See note 114 *supra* and accompanying text.

since other clearly discriminatory tax provisions¹²³ have passed constitutional muster in the past.¹²⁴

The fact that discriminatory treatment may have been upheld in the past, however, is not sufficient justification by itself for continued judicial support of such discrimination. If a court faced with the *Moritz* case were tempted to declare that section 214 was unconstitutional, however, there would still be a sound policy argument for the exercise of judicial restraint. Such a decision would set a precedent for taxpayers to appeal not only to Congress, as they do now, but also to the courts for relief from what they consider discriminatory provisions.¹²⁵ It is, of course, true that one decision or even a series of decisions would not prevent the courts from drawing a line and denying relief at any future time. Nevertheless, declaring that even one special provision of the Internal Revenue Code was discriminatory and therefore unconstitutional would tend to decrease the flexibility Congress now has in attempting to provide for tax equity.¹²⁶ Such a decision would give judicial support to one approach to achieving tax equity—the present “special provisions” system. This would be unfortunate. Congress should be encouraged to search for creative solutions to the changing problems of tax equity.

CONCLUSION

The Tax Court was correct in stating that *Moritz's* relief should be sought in Congress, not in the courts. The complexity of the problem of the dependent care deduction illustrated in this discussion would seem to prescribe that the appropriate legislative remedy should come through tax law rather than by means of an equal rights amendment. Even though traditional concepts of sex roles gave rise to the terms of portions of section 214, it was pointed out that those terms in practice do not result in discrimination on the basis of sex.¹²⁷ Although Charles E. *Moritz* as a single never-married man is denied the deduction, the discrimination is not purely on the basis of sex, and other factors must be considered

123. See notes 115, 119 *supra* and accompanying text.

124. Among other problems, one cannot be sure that a rule of law issuing from a case dealing with a tax provision which *directly* affects tax liability (such as the married-single distinction in the *Brushaber* case) would apply to section 214. *Moritz's* additional tax liability is only an *indirect* result of the operation of section 214 since the section acts only as a part of the income definition process prior to application of the statutory tax rate to determine tax liability. How much actual effect section 214 has on tax liability depends upon factors other than the dependent care deduction: the level of an individual's taxable income, which is affected as much by all other special provisions as by section 214, and the actual rate of tax upon the particular level of income involved.

125. COMPENDIUM 251-60.

126. See note 37 *supra* and accompanying text.

127. See p. 429 *supra*.

to provide an equitable legislative solution.

There is substantial support for the opinion that section 214 should be amended to provide a dependent care deduction for "all taxpayers" who can qualify under the first four limitations discussed herein.¹²⁸ Others have recommended even greater expansion.¹²⁹ Critics of section 214 have suggested that the provision be eliminated.¹³⁰ It is clear that no changes should be made in the provision without careful consideration of their effects on tax equity.¹³¹ For example, the suggestion has been made that the income ceiling limitation be removed¹³² and that a working woman be allowed an added deduction for expenses incurred for household services.¹³³ These suggestions have been made to solve what some feel to be a lack of tax equity resulting from an imputed income problem.¹³⁴ A housewife who contemplates becoming gainfully employed realizes that the net monetary gain to her family will not be the amount of her paycheck. This is because "[s]ervices ordinarily performed by the wife in the home are a significant element of the normal family's income"¹³⁵ When a woman chooses to work outside the home, she frequently must employ household help in addition to providing substitute care for her children. These expenses reduce her actual net income. The argument that these expenses should be deductible because of the imputed income problem, however, does not answer the problem in terms of tax equity. The difficulty arises because of a theoretical dispute among tax analysts who cannot decide how imputed income should be valued. Some say that "if a wife works there is no addition to the family's income, since her household services and leisure time are properly evaluated on the basis of potential earnings. The appropriate adjustments, then, [to achieve tax equity] is to impute to the income of nonworking wives the value of their foregone earnings."¹³⁶ Other tax analysts believe that the imputed income of housewives should be given the value of household services at the market cost of such services. Using this approach, an equitable solution would result by permitting working wives to deduct the cost of obtaining household help and dependent care from their

128. See note 53 *supra* and accompanying text.

129. See 1955 FED. TAX POLICY STUDY, *supra* note 11, at 363-64.

130. COMPENDIUM 435, 438.

131. *Id.* at 404.

132. Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114, 121 (1955).

133. 1955 FED. TAX POLICY STUDY 363-64; COMPENDIUM 371-72.

134. 1955 FED. TAX POLICY STUDY 363-64; COMPENDIUM 371-72.

135. 1955 FED. TAX POLICY STUDY 363.

136. *Id.* at n.13.

earnings so that only their actual income gain would be taxed.¹³⁷ The latter solution is what many now propose, since the first approach is impracticable because it is virtually impossible to determine foregone earnings accurately.¹³⁸ It is submitted, however, that the second imputed income valuation theory is invalid because the solution it offers does not truly answer the equity problem. This can be shown most clearly in regard to expenses incurred for household help.

All taxpayers require certain essential "household services:" those related to being fed, clothed and sheltered. If an individual is gainfully employed, he can choose to perform those services for himself after work, saving money but losing leisure time, or he can choose to pay others to perform the services for him, losing money and gaining leisure. It is obvious that the lower the income of the individual, the more likely he is to perform necessary services for himself after work rather than spending money to have them done by others. It would be absurd, in the name of "tax equity," to provide a deduction to a taxpayer who earned enough to afford to have others work for him so that he could have leisure time after work, when a taxpayer with less income was giving up that leisure time and was not entitled to a tax benefit.

It has been said that "[i]solated statements regarding the wisdom of a proposed amendment to any given section of the code cannot be made. The entire tax base must be viewed as a single entity before an enlightened opinion can be expressed on any given provision."¹³⁹ This analysis of section 214 is supportive of that proposition. Thoughtful consideration is mandatory before adoption of any deceptively simple solution to a tax problem such as that posed by Charles E. Moritz.

137. B. BITTKER, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 53-54 (3d ed. 1964) *quoting* VICKREY, *AGENDA FOR PROGRESSIVE TAXATION* 44-47 (1958); *COMPENDIUM* 371-72.

138. BITTKER, *supra* note 137, at 53-54.

139. *COMPENDIUM* 435.